Supreme Court, U.S.
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No. 09-62

In The
Supreme Court of the United States

FLOYCE REED PEYTON,

Petitioner,

v.

FRED'S STORES OF ARKANSAS, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

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August 14, 2009

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RULE 29.6 STATEMENT

Fred's Inc. is the 100% owner of Respondent Fred's Stores of Arkansas, Inc, and its successor Fred's Stores of Tennessee, Inc. Fred's Inc.'s stock is publicly traded (NASDAQ: FREDS).

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STATEMENT OF THE CASE

Plaintiff-Appellant Floyce Reed Peyton ("Peyton") sued Fred's Stores of Arkansas, Inc. ("Fred's") for recovery of damages under the Americans with Disabilities Act, 42 U.S.C. §12101 *et. seq.* ("ADA"), the Arkansas Civil Rights Act ("ACRA")[1] and the common law tort of intentional infliction of emotional distress.[2] Fred's hired Peyton as the manager of its Heber Springs, Arkansas store on or about December 5, 2005. Peyton trained under a manager of the Cabot, Arkansas store for approximately three (3) weeks before assuming her duties in Heber Springs. Peyton then worked for only two days at the Heber Springs store. On her third day as store manager, January 9, 2006, Peyton's fiancé went to the store with a physician's note stating that Peyton needed to be off work on January 9, 2006, and stating that "return date unknown @ [at] this time." (APP. 41.) Upon inquiries by Fred's, nobody could tell Fred's when, or even if, she would be able to return to work.

This Petition follows the Eighth Circuit Court of Appeals' affirmance of the Arkansas Eastern District Court's order granting Fred's Motion for Summary Judgment. When ruling, the Eighth Circuit stated "it is axiomatic that a person who cannot perform any of the functions of a job, with or without reasonable

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[1] The dismissal of this claim was not raised by Plaintiff in the Eighth Circuit appeal, and, as a consequence, any claim of error has been waived.

[2] The dismissal of this claim was not raised by Plaintiff in the Eighth Circuit appeal, and, as a consequence, any claim of error has been waived.

accommodation, cannot, as a matter of law, be considered 'otherwise qualified' under the ADA." *Peyton v. Fred's Stores of Arkansas, Inc.*, 561 F.3d 900, 903 (8th Cir. 2009). The court held that "in sum, the uncontroverted evidence shows that plaintiff's illness caused her to be unable to perform the essential functions of her job as defendant's store manager, and that there was no reasonable accommodation that would have allowed her to do so." *Id.* at 904.

Plaintiff-Appellant filed her Petition for A Writ of Certiorari on July 14, 2009.

STATEMENT OF THE FACTS

On or about December 5, 2005, Fred's hired Peyton to manage its Heber Springs, Arkansas retail store. Before assuming her duties at the Heber Springs store, Peyton underwent manager training at the Fred's store in Cabot, Arkansas for approximately three (3) weeks. After training, Peyton was to assume her full duties as store manager in Heber Springs. Peyton reported to work in Heber Springs on January 6th and 7th, 2006, but on January 9th, her third day of work, her fiancé arrived at the store with a doctor's note saying that Peyton would not be able to come to work that day and "return date unknown @ [at] this time." (APP. 41.)

Apparently, Peyton was diagnosed with cancer. She sought medical treatment in Little Rock, Arkansas. Nobody, including her doctor, was able to give Fred's a timeline for her return. (APP. 38-39). Due to her short period of employment, Peyton was not eligible for any benefits under the Family Medical Leave Act. Peyton never requested any accommodation. (APP. 40).

APPLICABLE LAW

Petitioner's ADA claim turns on whether she was a "qualified individual" and whether the indefinite leave she sought was a "reasonable accommodation." These terms, as they are applicable to this case, are defined in the ADA:

> (8) Qualified individual: The term "qualified individual" means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds....
>
> (9) Reasonable accommodation: The term "reasonable accommodation" may include – (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices ....

42 U.S.C. §12111 (8) and (9).

Petitioner was unable to perform any of the functions of her job, let alone the essential ones. Thus, she was not "otherwise qualified." Given that she was unable to report to work, there was no "reasonable accommodation" that would allow her to perform her job.

I. REASONS WHY THE PETITION SHOULD BE DENIED

The Arkansas District Court and the Eighth Circuit Court of Appeals correctly identified the key issue in

this case as being whether Petitioner was "otherwise qualified" as defined by the ADA and therefore within its protective scope. Both courts concluded that Petitioner was not "otherwise qualified" because she was unable to perform the essential functions of her job with or without an accommodation. Addressing an argument first made by Petitioner on appeal, the Eighth Circuit Court of Appeals also found that "her request for reasonable accommodation, though made for the first time in this case, is that defendant should have waited indefinitely to determine the full extent of her diagnosis, treatment and recovery." This "reconstituted" claim for an indefinite leave of absence likewise fails to raise an issue of reasonable accommodation. *Peyton v. Fred's Stores of Arkansas, Inc.*, 561 F.3d 900, 903 (8th Cir. 2009).

Petitioner states a new argument for the first time in her Petition that was not raised in either the District Court or the Court of Appeals. (See Petition, pgs. 17-18). She claims she did not understand the legal significance of Respondent's question to her regarding accommodations; however, her understanding of the legal significance of such questions has no bearing on the facts of the case or the Eighth Circuit's ruling affirming summary judgment. Because Petitioner did not raise this issue with the courts below, it is now too late to argue this point in an attempt to obtain review from this Court.

Petitioner claims that there is a split among the Circuit Courts as support for certiorari under Rule 10 of the Supreme Court Rules. To the contrary, no such split exists.

A. The reported decisions of nine circuit courts of appeal have each held that indefinite leave is not reasonable accommodation under the ADA.

In reported decisions, nine of the Circuit Courts of Appeals have addressed the issue of indefinite leave and each concluded that indefinite leave is not a reasonable accommodation under the ADA.[3] The remaining two circuits have come to the same conclusion in unreported decisions.[4] The facts in those cases are closely aligned with the facts of Petitioner's claim because in each the plaintiff was unable to provide their employers with an anticipated date of return. The courts determined that the plaintiffs were not "otherwise qualified" to perform the essential functions of their jobs and that, as a result, the ADA did not require accommodation. Similarly, Petitioner is not "otherwise qualified."

In *Watkins v. J & S Oil Company, Inc.*, 164 F.3d 55, 62 (1st Cir. 1998), the First Circuit affirmed summary judgment for the employer where the proof

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[3] *Watkins v. J & S Oil Company, Inc.*, 164 F.3d 55 (1st Cir. 1998); *Mitchell v. Washingtonville Central School District*, 190 F.3d 1 (2d Cir. 1999); *Myers v. Hose*, 50 F.3d 278 (4th Cir. 1995); *Rogers v. International Marine Terminals, Inc.*, 87 F.3d 755 (5th Cir. 1996); *Walsh v. United Parcel Sevice*, 201 F.3d 718 (6th Cir. 2000); *Byrne v. Avon Products, Inc.*, 328 F.3d 379 (7th Cir. 2003); *Rascon v. U.S. West Communications, Inc.*, 143 F.3d 1324 (10th Cir. 1998); *Duckett v. Dunlop Tire Corporation*, 120 F.3d 1222 (11th Cir. 1997).

[4] *Fogleman v. Greater Hazleton Health Alliance*, 122 Fed. Appx. 581 (3d Cir. 2004); *Dudley v. California Department of Transportation*, 213 F.3d 641 (table), 2000 WL 328119 (9th Cir. 2000).

showed only what could be construed as a request for indefinite leave observing that "...Watkins 'never informed [J & S] as to when he might be able to return or what accommodations he might require'...." The *Watkins* facts are directly analogous to the facts in Petitioner's case. Petitioner never requested any accommodation and could not advise Respondent when she would be able to return to work. Like the Eighth Circuit, the First Circuit concluded that "J & S was not required, for ADA purposes, to provide accommodation to Watkins for what amounted to an 'indefinite leave.'" *Watkins*, 164 F.3d at 62.

In similar fashion, the Second Circuit has held that an employer is not required to grant an indefinite leave of absence to an employee who is totally disabled and unable to inform the employer when he expected to be able to return to work. *See Mitchell v. Washingtonville Central School District,* 190 F.3d 1, 9 (2d Cir. 1999) and cases cited therein.

The Fourth Circuit has held that "...reasonable accommodation does not require [an employer] to wait indefinitely for [its employee's] medical conditions to be corrected, especially in light of the uncertainty of cure", in response to plaintiff's request for time to cure his disability without providing a "temporal limit on the advocated grace period, urging only that he deserves sufficient time to ameliorate his conditions." *Myers v. Hose*, 50 F.3d 278, 282-83 (4th Cir. 1995). Here too, Petitioner has taken the position that Respondent should have waited an indefinite period of time to allow her to cure her disability. The ADA does not require such an accommodation.

The Fifth Circuit likewise has held that an employer does not have to wait an indefinite period of time for an employee to cure disability. In *Rogers v. International Marine Terminals, Inc.*, 87 F.3d 755 (5th Cir. 1996), the plaintiff was unable to attend work for an extended period of time due to elective ankle surgery. The Fifth Circuit rejected plaintiff's argument that the defendant was required to accommodate him by allowing indefinite leave and held: "[n]othing in the text of the reasonable accommodation provision requires an employer to wait an indefinite period for an accommodation to achieve its intended effect. Rather, reasonable accommodation is by its terms most logically construed as that which presently, or in the immediate future, enables the employee to perform the essential functions of the job in question." *Rogers*, 87 F.3d at 759-60, citing *Myers*, 50 F.3d at 283.

The Sixth Circuit has ruled that reasonable accommodation under the ADA does not require providing an employee with indefinite leave. "[W]hen the requested accommodation has no reasonable prospect of allowing the individual to work in the identifiable future, it is objectively not an accommodation that the employer should be required to provide." *Walsh v. United Parcel Service*, 201 F.3d 718, 727 (6th Cir. 2000).

The Seventh Circuit agrees with its sister circuits that a request for indefinite leave does not constitute a request for reasonable accommodation under the ADA. In *Byrne v. Avon Products, Inc.*, 328 F.3d 379, 381 (7th Cir. 2003), the plaintiff did not want a defined period of time off, instead "his only proposed accommodation is not working for an extended time,

which as far as the ADA is concerned confesses that he was not a 'qualified individual'...." The "[i]nability to work for a multi-month period removes a person from the class protected by the ADA." *Byrne*, 328 F.3d at 381. In an earlier Seventh Circuit case, the plaintiff was not present at his teaching position for approximately eighteen (18) months prior to his termination and did not indicate "to any St. Rita administrator his intention to return to his teaching position." *Nowak v. St. Rita High School*, 142 F.3d 999, 1003 (7th Cir. 1998). An individual who is not able to come to work is not "otherwise qualified" under the ADA. "The ADA does not require an employer to accommodate an employee who suffers a prolonged illness by allowing him an indefinite leave of absence." *Id.* at 1004.

Courts recognize the distinction between an employee who requests a defined period of time off of work to receive medical treatment versus an employee that cannot articulate an anticipated date of return to work. In one of the cases cited in the Petition for Certiorari, the Tenth Circuit stated that "an allowance of time for medical care or treatment may constitute a reasonable accommodation", but that "an indefinite leave is not a reasonable accommodation where the plaintiff fails to present evidence of the expected duration of her impairment." *Rascon v. U.S. West Communications, Inc.*, 143 F.3d 1324, 1333-34 (10th Cir. 1998).

In *Duckett v. Dunlop Tire Corporation*, 120 F.3d 1222 (11th Cir. 1997), the plaintiff and his doctor admitted that the plaintiff "was unable to return to work in any capacity when he was terminated and required an indefinite medical leave." *Duckett*, 120

F.3d at 1225. The Eleventh Circuit cited *Myers v. Hose* and stated that "[n]othing in the text of the reasonable accommodation provision requires an employer to wait for an indefinite period for an accommodation to achieve its intended effect." *Duckett,* 120 F.3d at 1226.

Petitioner's argument in support of certiorari is that she made a request for temporary medical leave as an accommodation under the ADA. Nothing in the record supports Petitioner's argument that she sought temporary medical leave. The record establishes that Petitioner did not, upon inquiry, tell the Respondent how much time she needed to recover from surgery nor when she expected to return to work. (APP. 38).

The circuits holding that indefinite leave is not a reasonable accommodation have come to this conclusion based on the particular facts of each case. However, the primary fact commonly relied upon was that the plaintiffs were unable to provide their employers with any finite period of leave. Courts have consistently, and unanimously, held that such a broad and open-ended request is not reasonable and renders the plaintiffs not "otherwise qualified" for ADA protected leave.

Nothing in the ADA's definition of "reasonable accommodation" mentions indefinite leave. If it did, every person with a long term illness or disease would be entitled to job protection for an indefinite period of time and the ADA would function as permanent job insurance, a result clearly not contemplated by Congress. *See Taylor v. Wal-Mart Stores, Inc.*, 376 F. Supp. 2d 653 (E.D. Va. 2005). While this is what Petitioner is apparently seeking, the ADA does not support her position.

B. Cases cited in Petitioner's brief in support of a circuit split are inapposite to the facts of her case and do not address the issue of indefinite leave as a reasonable accommodation under the ADA.

Petitioner has cited no cases in her Petition for Certiorari holding indefinite leave is a reasonable accommodation where the plaintiff is unable to provide a date for returning to work. The record shows that Petitioner never informed the Respondent of a date when she could return to work and her case is one seeking indefinite leave as an ADA accommodation. (APP. 38-39).

Petitioner attempts to create a circuit split by citing cases that do not address indefinite leave. In the cases cited, the employees or their doctor provided the employer with an anticipated date of return and the issue of leave as a reasonable accommodation under the ADA only arose when additional leave was not granted under the facts of each case. *See, e.g.*, *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 642 (1st Cir. 2000) (Plaintiff's doctors informed defendant that the plaintiff would be able to return to work on July 30, 1996); *Graves v. Finch Pruyn & Company, Inc.*, 457 F.3d 181, 185 (2d Cir. 2006) (Plaintiff informed defendant that he needed a couple of more weeks to consult with a foot specialist and the Second Circuit determined that this was not a request for indefinite leave); *Walton v. Mental Health Association of South-Eastern Pennsylvania*, 16 F.3d 661, 664-65 (3d Cir. 1999) (Plaintiff wrote defendant a letter wherein she advised that her doctor did not want her to return to work until November 22 and that she intended to return on that date); *Cehrs v. Northeast*

Ohio Alzheimer's Research Center, 155 F.3d 775, 778 (6th Cir. 1998) (Plaintiff's doctor provided a form advising defendant of plaintiff's tentative return date of January 20, 2004. Plaintiff previously did not state a date of return; defendant required a date to be provided, which was then provided); *Nunes v. Wal-Mart Stores*, Inc., 164 F.3d 1243, 1245 (9th Cir. 1999) (Plaintiff's physician informed defendant that her disability started on March 7, 1995 and estimated she could return to work on May 1, 1995).

The cases cited above from Petitioner's brief include fact settings different from hers and are inapplicable to the central issue of her case; whether indefinite leave is a reasonable accommodation.

II. CONCLUSION.

The Petitioner does not present any unique or unsettled questions of law supporting a grant of certiorari. Every circuit has addressed the issue of indefinite leave as a reasonable accommodation under the ADA and each has come to a single conclusion: the ADA does not require indefinite leave. The issue is well settled and there is no circuit split to be resolved. The Petition fails to satisfy the requirements of Rule 10 of the Supreme Court Rules. The Respondent respectfully requests that certiorari be denied.

Respectfully submitted,

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